Unifying commercial laws of nation-states : coordination of legal systems and economic growth

General Conclusion

Movements for unification of nationally defined commercial laws are characterized by strategic interdependence between nation-states. Elementary non-cooperative game theory offers a conceptual framework in which to think about this strategic interdependence. A game in which there is a significant mixture of conflict and coincidence of interest between players provides an especially helpful model for explanation and analysis of tendencies towards unifying commercial laws of nation-states.

Unity in nationally defined laws may perhaps help to sweep away some of the many legal obstacles that stand in the way of cross-border trade and commerce among nation-states. At first blush, it may seem that, joined in a desire to promote cross-border trade and commerce, the interests of nation-states coincide completely. Indeed, in clearing legal hurdles for cross-border trade and commerce, every nation-state may stand to reap benefits from a surge in economic activity. Stated otherwise, purely self-interested nation-states, constrained by economic rivalry, will try to provide those laws to their own citizens that reduce transaction costs the most. On this ground, the view that, in overcoming legal obstacles to cross-border trade and commerce, nation-states will, albeit unintentionally, resort to the same laws over time has come to be widely accepted. If this thinking were correct, the unintended result of unbridled pursuit of self-interest by nation-states would be a spontaneous convergence of nationally defined laws, as if guided by an "invisible hand". Without any coordination between nation-states at all, unity in nationally defined laws will be brought about in those fields where a fall in legal barriers does actually stimulate economic growth, the argument continues. Thus, whereas some areas of the law, such as, for example, sales law will develop towards convergence spontaneously, other areas of the law, such as, for example, family law, will not. It is the needs of trade and commerce that mediate.

On closer scrutiny, however, the charge that, in advancing cross-border trade and commerce, the interests of nation-states coincide completely cuts the corner too close. Even when nation-states subscribe to the aim of unifying their laws on, say, sales voluntarily, this seems unlikely to entail accepting exactly the same legal solutions. This is because elimination of legal roadblocks to cross-border trade and commerce does not only make extra gains from trade possible, but, at the same time, also influences the distribution of the possible gains to be had. Even in the case that citizens in separate jurisdictions have identical

preferences regarding legal solutions, a whole set of legal solutions that generate an efficient allocation remains at their disposal. While all legal solutions in the set would result in an efficient allocation, these allocations are likely to differ in terms of the distribution of welfare among citizens in separate jurisdictions. Will nation-states succeed in selecting legal solutions that generate the very same efficient allocation without any coordination at all? This sounds highly implausible.

Moreover, nation-states will always have to incur costs in complying with legal rules of another jurisdiction. That is, even when the preferences of citizens in a given jurisdiction regarding legal solutions, for whatever reason, at a certain point in time, become identical to those of citizens in another jurisdiction, the costs of switching to unfamiliar legal rules, though now preferred the most, will still have to be borne. Thus, the sharper disparities in commercial laws of separate jurisdictions, the higher the costs of switching to the legal rules of another jurisdiction. It can be mentioned aside that with divergent preferences of citizens in separate jurisdictions regarding legal solutions, compliance with legal rules that are not preferred the most creates additional costs. Again, this opens the way for divisions to emerge between nation-states. For, in the first instance, nation-states may be bent on retaining their own legal rules. Thereby, any possible costs incurred in switching to legal rules of another jurisdiction are avoided. In sum, when it comes to lifting legal hurdles for cross-border trade and commerce, nation-states seem unlikely to read from precisely the same play sheet.

In light of the foregoing considerations, modeling drives for unification of (parts of) the commercial laws of nation-states as a non-cooperative game, three basic game-theoretical structures can arise. First of all, it may turn out that the extra costs incurred by every nation-state of switching to the legal rules of any other nation-states will exceed the extra benefits obtained. Of course, in this instance, a plan to unify divergent commercial laws will be thwarted by nation-states. This allows nationally defined commercial laws to diverge ever further. Secondly, it may turn out that the extra costs incurred by the one nation-state of switching to the legal rules of the other nation-states exceed the extra benefits obtained. However, the same is not true the other way around. In this instance, the one nation-state will never switch to the legal rules of the other nation-state. Consequently, in reducing legal impediments for cross-border trade and commerce, this will force the other nation-state to switch. Lastly, it may turn out that the extra costs incurred by the one nation-state of switching to the legal rules of the other nation-state do not exceed the extra benefits obtained. The same holds the other way around. This game-theoretical structure corresponds with a so-

called Coordination Game. The game demonstrates that, without any coordination at all, nation-states will only establish unity in (segments of) their laws by sheer chance. This is to imply that in order to achieve unity in (portions of) their laws, nation-states do need to coordinate their actions, for example by composing a uniform commercial law. While each nation-state in the game prefers that all nation-states coordinate their actions, the outcomes do not necessarily distribute the gains of coordination equally among the nation-states. Yet, the game itself does not address the issue of whether nation-states will ever be able to resolve disputes over which national legal rules to incorporate into a uniform commercial law.

In this respect, this study holds the view that in order for an effort to reach unity in nationally defined commercial laws to succeed, it requires the approval of a nation-state that is a powerful engine of economic growth. More often than not, one particular nation-state may be better able to foster economic growth than other nation-states. As a result, other nation-states will be more dependent upon exports to and capital investments from this particular nation-state than the other way around. By adopting the commercial laws of a nation-state that is strongest able to spur economic growth, other nation-states will most stimulate their own trade and commerce and most attract foreign direct investments as well.

Sure enough, in abiding by the laws of a nation-state that is strongest able to drive economic growth, other nation-states will have to incur extra costs. That is, the extra costs of getting accustomed to unfamiliar legal solutions. Also, the extra costs of complying with legal solutions that are possibly not preferred the most. But these initial (extra) costs may be offset by the possible future gains from the expected rise in the volume and value of trade and commerce with the said nation-state. So, the uniform commercial law produced not only makes (extra) gains from trade possible, but also influences the distribution of the possible gains to be reaped from trade and commerce. Nation-states may stand to gain the most when the legal rules of the nation-state that is better able to foster economic growth than other nation-states are introduced. Yet, at the same time, the nation-state that is most able to stimulate economic growth does not have to incur the (extra) costs of switching to the legal rules of another jurisdiction. Then again, for all extra future gains from trade and commerce created by a uniform commercial law, excessive costs of switching to legal rules that are unfamiliar and perhaps even unpreferred may still prevent a nation-state from implementing the said uniform commercial law.

The theoretical arguments advanced in this study rested ultimately upon detailed analysis of empirical observations. Three case studies provided empirical evidence. The first

study embarked upon an inquiry that focused on efforts to compose uniform commercial laws in the German Confederation in the 19th century. The next study explored the successful attempts at reducing parts of the common law to writing in the United States at the close of the 19th century and in the first half of the 20th century. The final study subjected to scrutiny the production of uniform commercial laws on a global level throughout the 20th century. The common thread to the three case studies is that nation-states only looked intent on unifying those segments of the law that created roadblocks for cross-border trade and commerce the most. In effect, all portions of the laws of nation-states seemed susceptible to a development towards divergence, but enacting a uniform law was only worth the effort when divergent legal rules shackled foreign trade and commerce. As matters turned out, with national commercial laws splintering ever more, nation-states called for the construction of uniform laws pertaining to bills of exchange and sales, in particular. As productions of uniform commercial laws are always fraught with difficulties, the empirical evidence does not lend support to the thesis that commercial laws of nation-states will converge spontaneously. What is more, the theoretical argument that a nation-state that is better able to generate economic growth than other nation-states will be able to enjoy significant influence over the drafting of a uniform commercial law is also supported by the three case studies.

The suggestion with which this study concludes is that the view that processes of unifying commercial laws of nation-states can be explained by using a "converge theory" proves untenable.